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In the Supreme Court
of the United States

OCTOBER TERM 1964

No. 301

ELMER J. DAY,

Petitioner,

NORTHWEST DIVISION 1055 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a labor union, and C. A. BANKHEAD, an individual,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioner, Elmer J. Day, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon, entered in the above entitled case on January 29, 1964, with a denial of petition for rehearing on April 28, 1964, reversing the judgment of the trial court in favor of petitioner and dismissing the cause.

CITATIONS OF OPINIONS BELOW

The only written opinion, that of the Supreme Court of the State of Oregon, is reported in 78 Or. Adv. Sh. 121, 389 P.2d 42, and is printed in Appendix B hereto, *infra*, p. 22).

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was entered January 29, 1964 (R. 39; Appendix B, *infra*, p. 47). Rehearing was denied on April 28, 1964 (R. 38, Appendix B, *infra*, p. 46).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Is an employee debarred from obtaining damages in a state court against a labor union for wrongfully expelling him from the union, where the union's conduct involves a breach of a collective bargaining agreement with his employer and of the union's fiduciary obligation to the employee and where the union did not afford the employee the safeguards against improper expulsion guaranteed by the Landrum-Griffin Act of 1959?

STATUTES INVOLVED

Th statutory provisions involved are Section 7, Section 8(a)(1), Section 8(a)(3), Section 8(b)(1), Section 8(b)(2), and the first two sentences of Section 10(a)

of the National Labor Relations Act as amended; 49 Stat. 449 ff, 61 Stat. 136 ff, 73 Stat. 525; 29 U.S.C. §§ 157, 158, 160. Section 301(a), Section 302(c)(4) of the Labor Management Relations Act of 1947, as amended; 61 Stat. 136, 156 ff, 73 Stat. 519, 537, 29 U.S.C. §§ 185, 186; Section 101(a)(5), Section 103 and Section 603(a) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 ff, (29 U.S.C.A. §§ 101 et seq.) These provisions are printed in Appendix A, *infra*, p. 17.

STATEMENT

Elmer J. Day, petitioner herein, was employed as a bus driver by Western Greyhound Lines, a division of Greyhound Corporation (hereinafter referred to as "Greyhound") from June, 1953, until November 3, 1959, when he was discharged (Ex. 15). During this time he was also a member of respondent Northwest Division of The Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America (hereinafter referred to as "Union"), a labor union which operated under a collective bargaining agreement with Greyhound covering petitioner's employment (Ex. 58, Contract B). Respondent Bankhead is the Financial Secretary of the Union.

In August 1959 petitioner and other employees of Greyhound, members of the Union, objected to the practice of deduction of the Union's dues from their wages by the "check-off" method on the ground that this was illegal unless done with the employees' authorization

(Ex. 1, 9 and 10, Tr. 267).[1] The Union thereupon sought to obtain written consents to such deductions, but without success so far as petitioner was concerned. On or about October 9, 1959, Greyhound was notified by petitioner and others to discontinue deduction of Union dues and Greyhound complied (Ex. 9, 10 and 70).

In October petitioner's September union dues which had been deducted from his wages by Greyhound in September were returned by Greyhound to petitioner (Ex. 9 and 10, Tr. 86). On October 27, 1959, petitioner, in response to a request from respondent Bankhead (Ex. 1), paid Bankhead his September Union dues (Ex. 49), and indicated that he would pay his October dues in November (Tr. 31, 32). On November 2, respondent Bankhead wrote Greyhound that petitioner had "suspended" himself from membership in the Union and requested that, in compliance with the Union security clause of its collective bargaining agreement with Greyhound, petitioner be removed from employment (Ex. 2). On November 4, petitioner was advised that he had been taken out of service (Tr. 34). Starting with November 3, 1959, petitioner made repeated futile attempts to persuade the Union to accept his dues. Subsequent to petitioner's expulsion, the Union accepted from several other employees payment of their October dues in November (Ex. 4, 5 and 50, Tr. 241-243, 254-256).

On November 12, 1959, petitioner protested his discharge to the Portland Regional Office of the National

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[1] "Tr." refers to transcript of testimony, 3 volumes, certified in Record of court below as Item 1; identified in Index to Contents as Documents Separately Transmitted.

Labor Relations Board (Ex. 55). On December 15, 1959, the Regional Director of the Portland Office advised petitioner that he had carefully investigated his charges, and that there was insufficient evidence of violation to warrant the issuance of a complaint (Ex. 54; see also Appendix B, *infra* p. 28).

On November 30, 1959, petitioner filed a complaint in the Circuit Court of the State of Oregon for the County of Multnomah, charging the Union, Bankhead and others with conspiring to remove him from membership in the union in violation of his right to union membership and with wrongfully depriving him of his employment. The complaint alleged that the defendants' wrongful acts were due to the ill-will borne petitioner for his activities in protesting the operation of the check-off system and that defendants had determined to make an example of him. It further alleged that petitioner's expulsion prevented him from following his employment, for which he was specially trained and experienced, and deprived him of seniority and other vested rights and benefits to which he was entitled by virtue of his contract of employment and his union membership (Amended Complaint R. 1).[2]

On November 16, 1960, defendants Union and Bankhead demurred to an amended complaint on the ground that the court lacked jurisdiction of the subject matter, because "this field of law has been preempted by the Federal Congress through the Labor Management Relations Act of 1947 as amended." The trial court over-

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[2] Amended Complaint certified in Record as Item 2, appearing on p. 1 of Record of court below.

ruled the demurrer (Apps.' Abst. of R. p. 11).[3] The defendants asserted the same defense in their answer and the judge presiding at the trial struck the defense before submitting the matter to the jury (Tr. 411, 412). The jury brought in a general verdict for the petitioner, as well as a special finding of conspiracy, and awarded damages, and judgment was entered accordingly for the plaintiff.

On appeal, the Oregon Supreme Court, "with reluctance" and with two judges dissenting, reversed the judgment of the trial court and ordered the action dismissed, relying on *Association of Journeymen* v. *Borden*, 373 U. S. 690, *Iron Workers' Union* v. *Perko*, 373 U.S. 701, and *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, concluding that "*Borden* and *Perko* limit plaintiff's relief here to the National Labor Relations Board." 78 Or. Adv. Sh. 122; Appendix B, *infra* p. 23. According to the court below, these decisions "all tell us that if the conduct alleged 'may reasonably be asserted to be subjected to Labor Board's cognizance,' then the courts, both state and federal, are without any right to proceed. In this case the Board does reasonably have cognizance of the question at issue and we must desist from further proceedings." 78 Or. Adv. Sh. 124; Appendix B, *infra* p. 25.

REASONS FOR GRANTING THE WRIT

1. This case affords this Court the occasion to clarify

[3] Appellants' Abstract of Record refers to Abstract of Record filed by respondent in court below; identified as Item 8 of Record and designated "Appellants' Abstract of Record and Brief."

current misunderstandings as to the scope and interrelationship of three important areas of federal labor law:

(a) The provision for the enforcement of collective bargaining agreements, in State as well as Federal Courts, envisioned under Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a).

(b) The handling of unfair labor practices proscribed by Section 8 of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158, 160(a).

(c) The methods of protecting employees against arbitrary conduct of labor unions established pursuant to the Labor-Management Reporting and Disclosure Act of 1959, involving Sections 101(a)(5), 103 and 603(a) of the Act, 73 Stat. 522, 523, 540 (29 U.S.C.A. §§ 411(a)(5), 413, 523(a)).

Failure properly to apprehend the underlying relevance, purpose and limits of these three legal areas has led the court below to deny relief to petitioner, on the mistaken premise that such expulsion was "arguably" an unfair labor practice subject to the exclusive regulation of the National Labor Relations Board. Petitioner's expulsion really constituted (1) a breach of his employment rights under a collective bargaining agreement, cognizable under Section 301(a) of the Labor Management Relations Act of 1947, and (2) an illegal abridgement of his right under state common law to be free from arbitrary union conduct, a right guaranteed by Section 101(a)(5) of the Labor-Management Reporting

and Disclosure Act of 1959. Both of these rights may be enforced by petitioner in the state courts. The judgment below was solely in damages; it did not order petitioner restored to his job.

As the powers of labor unions over their members have become magnified, the need for the protection of those members against arbitrary union conduct has become enhanced. Moreover, the consequences for employees of expulsion from union membership, particularly for employees in industries governed by collective bargaining agreements with union security clauses such as that involved in the instant case, have become increasingly drastic and punitive. Nothing in federal law forecloses state court suits for damages in these circumstances, see, e. g. *International Association of Machinists* v. *Gonzales*, 356 U.S. 617.

This case involves reprisals undertaken by union leadership against a union member who had incurred their displeasure by his opposition to illegal union activities. It underscores the necessity for insuring effective enforcement of the fiduciary responsibility of unions towards their own members and of effective regulation of arbitrary union conduct, particularly where the issue of membership retention is concerned. Such matters are not within the legal or practical competence of the National Labor Relations Board; yet the absence of a clear line of demarcation between these matters and unfair labor practices, involving primarily labor management relations and the encouragement or discouragement of union membership, has led the Oregon Su-

preme Court to ignore specific statutory provisions holding state courts competent to enforce the rights of union members against their own unions.

The scope of the existing confusion is illustrated by the Oregon Supreme Court's bland assumption that, "if the discharge for failure to pay dues was used as a subterfuge to hide some other improper motive, as in the instant case, the union, at least, has been guilty of an unfair labor practice and the National Labor Relations Board will, presumably, protect the workman's rights," 78 Or. Adv. Sh. 124; Appendix B, *infra*, p. 25. Yet the court below ignored the fact that this particular workman did go to the National Labor Relations Board and was told by its Regional Director that after careful investigation there was insufficient evidence of violations (Ex. 54). The net result of this legal paradox is that a worker who lost six years of accumulated seniority (Tr. 102, Ex. 58, p. 23), retirement pension benefits amounting to at least $1,600 a year (Tr. 208-9), $4,900 in life insurance and hospital and sick leave benefits (Tr. 209), and the right to continue in his chosen vocation, whose earning power was drastically reduced (Tr. 59, 61-2, 141-2, 145), and who suffered mental anguish, both from his inability subsequently to obtain regular employment and from financial hardship (Tr. 66, 234-5, 57-9), is left without any legal recourse. This, in our view, was not the Congressional intent, nor is it consistent with the statutory scheme, properly understood.

Other more specific problem areas calling for clarification will suggest themselves in the specific discussion that follows.

2. The decision of the court below is, we submit, erroneous, because it took no account of the fact that petitioner's expulsion constituted a violation of the Union's constitution and of the collective bargaining agreement pursuant to which petitioner was employed, and a breach of the Union's fiduciary responsibility to petitioner. In such circumstances, as the dissenting opinion pointed out (78 Or. Adv. Sh. 133-5), the controlling Congressional policy is that expressed in Section 301(a) of the Labor Management Relations Act (29 U.S.C. § 185(a)), pursuant to which suits for violation of collective bargaining agreements may be brought against either employers or unions in state courts, as well as federal courts.

Where such violations are involved, this Court has held that the so-called preemption doctrine of *Garmon* and other cases does not apply and that federal and state courts have jurisdiction, even where the conduct "not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board." *Smith* v. *Evening News Association*, 371 U.S. 195; *Humphrey* v. *Moore*, 375 U.S. 335; *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261. In fact, Congress specifically refused to pass legislation which would have declared violations of collective bargaining agreements to be unfair labor practices, and the National Labor Relations Board has indicated that it is not the proper forum for remedying such breaches, see *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 509ff; *International Union, United Mine Workers of America* v. *N.L.R.B.*, 257 F.2d 211, 215 (C.A. D.C.).

The facts in this case fall within the rule of the *Gonzales, Smith* and *Humphrey* cases. Petitioner's employment with Greyhound was pursuant to a collective bargaining agreement, which contained a union security clause requiring employees to "remain members (of the union) as a condition precedent to continued employment" (Ex. 58, Contract B, p. 5).[4] The relevant provision of the Union's Constitutional and General Laws provides that:

> "Where a member allows his arrearage for dues, fines and assessments to run over the last day of the second month without payment, he does thereby suspend himself from membership in this Association, * * *" (Ex. 59, p. 3).

On October 27, 1959, petitioner, in response to a request from respondent Bankhead, Financial Secretary of the Union, paid Bankhead his September union dues, and indicated that he would pay his October dues in November (Tr. 30-32, 117, 118). On November 2, Bankhead reported to Greyhound that petitioner Day had suspended himself from membership and that consequently Greyhound was obligated, under its agreement, to terminate petitioner's employment (Ex. 2). On November 3, petitioner mailed to the Union a check covering his October and ~~December~~ November dues (Ex. 43, Tr. 34). On November 4, petitioner was advised that he had been taken out of service (Tr. 34). On November 5, respondent Bankhead returned petitioner's check for his

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[4] Inadvertently, the court below quoted the words of another collective bargaining agreement, not admitted in evidence, that did not relate to petitioner. Tr. 272-277; see Petition for Rehearing, p. 4-6.

October and November dues, advising him that he was "no longer employed in an industry covered by our union jurisdiction" (Ex. 3, Tr. 36).[5] Subsequent to petitioner's expulsion, the union accepted from several other employees payment of their October dues in November (Ex. 4, 5, 50, Tr. 241-243, 254-256). Greyhound's representative, when appealed to by petitioner, said that there was nothing he could do and that "this was a matter between he (petitioner) and the Union" (Tr. 212).

Under the Union's Constitution, petitioner had until the end of November to pay his October dues. Since petitioner's union membership was terminated on November 3 for failure to pay his October dues, the Union was clearly violating petitioner's rights under the Union's Constitution. In falsely advising Greyhound that petitioner had been suspended from union membership for non-payment of dues and calling upon Greyhound to terminate petitioner's employment, respondents Union and Bankhead were breaching their fiduciary responsibility towards petitioner and infringing petitioner's rights under the collective contract with the employer, in violation of Section 301(a) of the Labor Management Relations Act.

Garmon, Borden and *Perko*, cases relied on by the court below, involved neither collective bargaining agreements nor the expulsion of a member from his union. Accordingly petitioner's state court action against the union does not fall within the pre-emption doctrine

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[5] Union Constitution (Ex. 59, Secs. 70, 74) makes existing employment by street, electric railway or bus company a prerequisite to eligibility for membership.

laid down in those cases, but is a valid exercise of a federal right conferred by the Congress.

3. Since the Union's illegal expulsion of petitioner is so clearly a Section 301(a) matter cognizable by the state courts, it is not necessary to decide whether it is "arguably" an unfair labor practice. However, it should be noted that petitioner's case against the Union involves neither of two basic elements inherent in the unfair labor practices proscribed by Section 8 of the National Labor Relations Act, as amended. The Union's conduct did not involve direct labor management relations, nor was it concerned with the encouragement or discouragement of membership in labor unions. See *Local* 357, *International Brotherhood of Teamsters* v. *N.L.R.B.*, 365 U.S. 667.

The dispute was purely an internal one between petitioner and the Union and did not involve the employer (Tr. 212). The motivation of the union and its officials was to punish petitioner and make an example of him for opposing the Union's "check-off" policy. The employer acted on the basis that it was complying with its specific contractual obligation with the Union to terminate the employment of persons who were no longer union members.[6]

Moreover, a union cannot be guilty of discriminating against an employee in violation of Section 8(b)(2) of the National Labor Relations Act, as amended (29

[6] The employer while originally named as a defendant in the proceedings below was by stipulation dismissed from the case prior to the trial (R. 16, 17).

U.S.C. § 158(b)(2)), unless the discrimination sought by the union would also constitute a violation by the employer of Section 8(a)(3) (29 U.S.C. § 158(a)(3)), if the employer acted without union suggestion or compulsion. See *Local* 357, *International Brotherhood of Teamsters* v. *N.L.R.B.*, *supra*, at p. 13; *National Labor Relations Board* v. *Local* 294, 317 F.2d 746, 749 (C.A. 2d Cir.). And when Congress enacted Section 301(a) in 1947, it also adopted a proviso to Section 8(a)(3) to the effect that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

Taking Section 301(a) in conjunction with this amendment and Congress' refusal to declare acts involving aspects of internal union affairs to be unfair labor practices (see p. 10, *supra*), the Congressional history of the Taft-Hartley Act of 1947 "tends to negative a congressional purpose to effect extensive and detailed statutory regulation of internal union affairs." *Parks* v. *International Brotherhood of Electrical Workers*, 314 F.2d 886, 915 (C.A. 4th Cir.), cert. denied, 372 U.S. 976. To remit petitioner with his purely internal dispute against the Union to the exclusive jurisdiction of the National Labor Relations Board would be a negation of this legislative policy. "The purpose of Congress is the ultimate touchstone". *Retail Clerks Int. Assn., Local* 1625 v. *Schermerhorn*, 375 U.S. 96, 103.

4. When, in the Labor-Management Reporting and Disclosure Act of 1959, Congress tackled the problem of

regulating the internal affairs and organization of labor unions, it indicated, in two sections of that Act, that it was not remitting union members to the exclusive jurisdiction of the National Labor Relations Board but was preserving to them all "remedies under any state or federal law, or before any court or other tribunal." See Sections 103 and 603(a) of the Act (29 U.S.C.A. §§ 413, 523(a)).

On the record made in this case, failure to pay dues, in the words of the Oregon Supreme Court, was "a subterfuge to hide some other improper motive." Accordingly, petitioner's wrongful expulsion from membership in the Union is specifically covered by Section 101(a)(5) of the 1959 Act, which prohibits a labor organiation from expelling a member, "unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

Petitioner was denied these safeguards against wrongful discharge. Accordingly, Section 103, (as well as Section 603(a)), of the 1959 Act confirms the right of petitioner to maintain his action for redress in the Oregon courts, for it " 'only means that the new federal protection was superimposed on protection already available in other forums, "reinforcing and not supplanting it" Summers, "The Law of Union Discipline, What the Courts Do in Fact" 70 Yale L.J. 175, 176 (1960)' *Parks* v. *International Brotherhood of Electrical Workers*, 314 F.2d 886, 922 (4 Cir. 1963)." *Rekant* v. *Shoctay-Gasos Union, Local* 446, 320 F.2d 271 (C.A. 3rd Cir.).

CONCLUSION

For the reasons stated, it is respectfully urged that this petition for a writ of certiorari be granted.

Respectfully submitted

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APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended, 49 Stat. 449 ff, 61 Stat. 136 ff, 73 Stat. 525; 29 U.S.C. §§ 157, 158, 160, are as follows:

Sec. 7 Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. (49 Stat. 452, 61 Stat. 140, 29 U.S.C. § 157)

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor

practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe

its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. (49 Stat. 452, 61 Stat. 140, 73 Stat. 525, 29 U.S.C. § 158).

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: (49 Stat. 453, 61 Stat. 146, 29 U.S.C. § 160(a)).

The relevant provisions of the Labor Management Relations Act of 1947, as amended, 61 Stat. 136, 156 ff, 73 Stat. 519, 537, 29 U.S.C. §§ 185, 186, are as follows:

Sec. 301 (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in

controversy or without regard to the citizenship of the parties. (61 Stat. 156, 29 U.S.C. § 185(a))

Sec. 302 (a) It shall be unlawful for any employer * * * to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

* * * *

(2) to any labor organization, or any officer or employee thereof, which represents * * * any of the employees of such employer who are employed in an industry affecting commerce;

* * * *

(c) The provisions of this section shall not be applicable * * * (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; * * *

(d) Any person who wilfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States court of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this

title, and the provisions of sections 101-110 and 113-115 of this title. (61 Stat. 157, 73 Stat. 537, 29 U.S.C. § 186).

The relevant provisions of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 ff (29 U.S.C.A. §§ 101 et. seq.) are as follows:

Sec. 101(a)(5) *Safeguards against improper disciplinary action.*—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges: (B) given a reasonable time to prepare for his defense: (C) afforded a full and fair hearing. (73 Stat. 522).

Sec. 103 Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal Law or before any court or other tribunal, or under the constitution and by-laws of any labor organization. (73 Stat. 523).

Sec. 603 (a) Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State. (73 Stat. 540).

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

DAY, *Respondent*, v. NORTHWEST DIVISION 1055 ET AL, *Appellants*.

Appeal from Circuit Court, Multnomah County.

ARNO H. DENECKE and E. K. OPPENHEIMER, Judges.

Before MCALISTER, Chief Justice, and ROSSMAN, PERRY, SLOAN, O'CONNELL, GOODWIN and LUSK, Justices.

REVERSED (Filed January 29, 1964)

SLOAN, J.

Plaintiff Day was employed as a driver by Western Greyhound Lines. His employment was governed by a contract between Greyhound and defendant local union Northwest Division 1055. Amongst other things this contract required Day to remain a member of the union in good standing in order to retain his employment. On November 3, 1959, Day's employment was terminated by Greyhound at the request of the individually named defendant, Bankhead. The latter was financial secretary of the union. The ostensible cause of Bankhead's request that Day's employment be terminated was the failure of Day to pay his union dues on time. There was evidence to show, and the jury found, that the real cause was a conspiracy to get Day out of the union. Day brought this action for tortious interference with his employment and received a large

jury verdict for general and punitive damages. Defendants union and Bankhead appeal.

Other defendants were originally named; we need not consider them. They have been removed from the case. Other detailed facts could be stated. This is unnecessary. The basis of our determination of the case is two recent decisions of the United States Supreme Court on the subject of federal pre-emption of disputes like the instant case. These cases, *Association of Journeymen* v. *Borden*, 375 US 690, 83 S Ct 1423, 10 L Ed2d 638, and *Iron Workers Union* v. *Perko*, 373 US 701, 83 S Ct 1429, 10 L Ed2d 646, were both decided on June 3, 1963. Unfortunately these decisions were filed after the pre-emption issue was decided on a pleading's issue by the trial court and after briefs were filed by the parties here.

Our study of these and other cases and authority have caused us to conclude that *Borden* and *Perko* limit plaintiff's relief here to the National Labor Relations Board. The earlier case of *Machinists* v. *Gonzales*, 1958, 356 US 617, 78 S Ct 923, 2 L Ed2d 1018, which gave support to plaintiff's claim here has now been substantially modified, if not overruled, by later cases. The first case after *Gonzales* to further restrict the jurisdiction of the state courts was *San Diego Unions* v. *Garmon*, 1959, 359 US 236, 79 S Ct 773, 3 L Ed 2d 775. The *Garmon* decision caused the Second District, Division One of the California Court of Appeals in *Fullerton* v. *International Sound Technicians, Etc.*, 1961, 194 CA2d 801, 15 Cal Rptr 451, by an extensive

opinion, to conclude that federal authority had pre-empted all cases of the kind now before us. And in *Perko* the court stated at 373 US 705 that:

> "At the outset we note that for the reasons set forth in *Borden, ante,* p. 690, the rationale of the *Gonzales* case does not support state jurisdiction here, and we need not now consider the present vitality of that rationale in the light of more recent decisions."

The dissenting opinion in the *Borden* case provides strong emphasis that *Gonzales* can no longer be held to support state jurisdictions in the instant and other like cases.

It is true that in *United Workers* v. *Laburnum Corp.*, 1954, 347 US 656, 74 S Ct 833, 98 L Ed 1024, followed later by *Automobile Workers* v. *Russell*, 1958, 356 US 634, 78 S Ct 932, 2 L Ed2d 1030, the court sustained recovery in state courts for damages in tort. But in the later case of *Garmon*, supra, at 359 US 236, 247, the *Laburnum Construction Corporation* and *Russell* cases were limited to torts by violence which created a "compelling state interest" to maintain domestic peace.

We learn from cases like *National Lab. Rel. Bd.* v. *Technicolor Motion Pic. Corp.*, (9th Cir USCA, 1957), 248 F2d 348, and *International Union of Electrical, R. & M. Wkrs.* v. *N.L.R.B.*, (USCA-DC 1962), 307 F2d 679, that a union may lawfully require an employer to discharge an employe for a failure to maintain good standing in the union, when the union contract permits it, as in the instant case. If the re-

quest for discharge has been honest and for the actual reason assigned, the union and employer are within their rights and it is held that no unfair labor practice has occurred. But, if the discharge for failure to pay dues was used as a subterfuge to hide some other improper motive, as in the instant case, the union, at least, has been guilty of an unfair labor practice and the National Labor Relations Board will, presumably, protect the workman's rights. The cases leave no doubt that the decision as to the true nature of the discharge is within the cognizance of the Board.

Garmon, supra, *Borden* and *Perko* all tell us that if the conduct alleged "may reasonably be asserted to be subject to Labor Board's cognizance," then the courts, both state and federal, are without any right to proceed. In this case the Board does reasonably have cognizance of the question at issue and we must desist from further proceedings.

We have no hesitancy in stating that we reach that conclusion with reluctance. However, the result has been fortified by *Retail Clerks Internat'l Ass'n, Local* 1625 v. *Schermerhorn*, decided December 2, 1963, — US —, 84 S Ct 219, 223, 11 L Ed2d 179, 185, wherein the court made this reference to the *Borden* and *Perko* cases:

> "We held in Plumbers' Union v. Borden, 373 US 690, 10 L ed 2d 638, 83 S Ct 1423, and in Iron Workers v. Perko, 373 US 701, 10 L ed 2d 646, 83 S Ct 1429, that Garmon preempted the field where employees were suing unions for damages arising out of practices that arguably were unfair labor

practices subject to regulation by the National Labor Relations Board. * * *."

It follows that the action must be dismissed.

PERRY J., dissenting.

The majority fail to set forth the facts which are necessary to determine this case, so I shall do so.

The material facts in this case are that plaintiff Day was a member of the defendant Local 1055, a labor union; that he was employed as a bus driver by the Greyhound Corporation, a corporation engaged in interstate commerce. The union had a union-shop agreement with Greyhound. A check-off system for the payment of dues was inaugurated by the officers of the union and acquiesced in by Greyhound. A number of the employees, among them this plaintiff, protested the deduction of dues from pay checks because they had not signed authorization cards, and thereafter plaintiff received his pay check without the deduction. This change required the plaintiff to pay his dues directly to the union.

After this change was made in the method of the payment of dues, the defendant Bankhead, as financial secretary of the union in charge of collection of membership dues, wrote a letter to plaintiff, advising him that he was delinquent in the payment of his September dues, but would be allowed until October 28, 1959, to make this payment, or be suspended.

Plaintiff, on October 27, 1959, went to the union office and paid his September dues. At this time, Bank-

head advised plaintiff that his October dues were owing and must be paid by October 31. 1959. Bankhead then determined the defendant was no longer a member of the union. On November 2 Bankhead notified Greyhound to discharge plaintiff, as he had suspended himself from membership in the union and was, therefore, no longer a member in good standing as required under the union-shop agreement.

Pursuant to Bankhead's notification, Greyhound on November 4 notified plaintiff that he was discharged. The morning of November 5 the amount of the dues, $14.00, was received by defendant for plaintiff's October and November dues. This money had been placed in the mails on November 3, one day before his discharge by his employer. The tender of dues was then rejected by the union on the basis that at the time the tender was received the plaintiff was not then employed as a bus driver or in any activity or industry over which the union exercised jurisdiction.

On November 12, on an approved form, plaintiff filed a "charge" against the union, alleging it had engaged in an unfair labor practice "within the meaning of Section 8(b) subsections 1 and 2 of the National Labor Relations Act, * * * affecting commerce * * *," as follows:

> "The above labor organization successfully and unlawfully demanded my discharge by the employer named below for the reason of delinquency in dues. I was notified by the Company's chief dispatcher at about 6:00 P.M. on November 4, 1959, that I was discharged. On November 3, 1959, by

deposit in the mails, addressed to the Union, I tendered my dues payment for October and November, 1959, and the dues payment was in possession of the Union prior to my discharge."

On December 15 the plaintiff received the following notice from the Regional Director:

"The above-captioned cases charging violations under Section 8 of the National Labor Relations Act, as amended, have been carefully investigated and considered.

"As a result of the investigation, it appears that, because there is insufficient evidence of violations, further proceedings are not warranted at this time. I am therefore refusing to issue Complaint in these matters.

Purusant to the National Labor Relations Board Rules and Regulations (Section 102.19), you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington 25, D.C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request must be received by the General Counsel in Washington, D.C., by the close of business on December 28, 1959. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file."

The Regional Director states he has carefully investigated the plaintiff's complaint and there is not sufficient evidence "at this time" to prosecute the complaint. It should be noted that all of the evidence offered in this case was available at the time the com-

plaint was filed. The plaintiff made no attempt to obtain a review of the findings and decision of the Regional Director, and the decision of the Regional Director thus became final.

There is some evidence that on occasion other union members had been late in the payment of dues, but they were not dropped from membership if the dues were later tendered. There is also evidence that plaintiff had objected to the check-off system. The union rules in relation to the late payment of dues provide as follows:

> "All dues, fines and assessments of the members of this Association are due and payable on the first day of each month for that month, and all moneys owed the Association by a member shall be considered as dues and come under the same terms for collection of dues, unless other arrangements are made. They must be paid by the fifteenth of the month in order to continue the member in good standing. The member on paying his dues, shall receive from the F. S. a working card as a receipt, which is evidence of his standing in the L.D. A member in arrears for his dues, fines and assessments after the fifteenth day of the month is not in good standing and not entitled to sick, disability or funeral benefits, or to the protection of the Association, in any manner whatsoever, and where a member allows his arrearage in dues, fines and assessments to run into the second month before paying the same, he shall be debarred from benefits for one month after payment. *Where a member allows his arrearage for dues, fines and assessments to run over the last day of the second month*

without payment, he does thereby suspend himself from membership in this Association, and the fact that the member is not in possession of his monthly working card is due notice to him of his suspension from membership and no further notice will be necessary. Where agreements with employing companies provide that members must be in continuous good financial standing, the member in arrears one month may be suspended from membership and removed from employment, in compliance with terms of the agreement." Constitution and General Laws, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, Section 91. (Emphasis ours.)

The agreement between Greyhound and the union insofar as applicable is as follows:

"*All employees within the scope of this Agreement shall become members of the Association and remain members in good standing* as a condition precedent to continued employment with the Company. Any new employees within the scope of this Agreement shall thirty (30) days from the date of their employment become members of the Association and shall thereafter remain members in good standing as a condition precedent to continued employment with the Company." Section 11, Union Membership. (Emphasis ours.)

The plaintiff in his complaint alleges:

"VIII

"* * * defendant Amalgamated Association and component unions, including defendant Northwest Division 1055, entered *into a collective bargaining agreement* with defendant Greyhound Corpora-

tion for employees of defendant Northwest Division 1055 who were working for Greyhound, including plaintiff Elmer J. Day; that Greyhound Corporation recognizes defendant Amalgmated Association and defendant Northwest Division 1055 as the representative of those employees.

"IX

"Alleges that plaintiff Elmer J. Day was and now is a member of defendant Northwest Division 1055 and an employee of Greyhound Corporation and that plaintiff Day had six years seniority and therefore had acquired seniority rights and benefits.

"X

"That Greyhound Corporation and defendant Northwest Division 1055 utilized 'Check Off' system for deduction of plaintiff's union dues from his wages; that on October 9, 1959, plaintiff and other members of Northwest Division 1055 notified defendant Greyhound Corporation that the Check Off practice was unlawful and requested it to be discontinued.

"XI

"That said action of plaintiff and other employees in objecting to the unlawful use of the Check Off practice displeased all of the defendants named in this action, and disrupted the uniform application of the Check Off to all employees of defendant Greyhound Corporation who were members of defendant Northwest Division 1055 and defendant Amalgamated Association and caused ill will to be generated toward plaintiff by said defendants and the individual defendants who conducted the affairs of said defendant unions; that

all of said defendants including the individual defendants, Charles C. McCaffery, Floyd L. Johnson, C. A. Bankhead and William J. Lever, who conducted the affairs of said unions in the territory of the defendant Northwest Division 1055, as representatives of the defendant unions and in their individual capacity desired to continue said unlawful practice and to continue to apply the Check Off to all members of said unions so as to maintain the control of defendant Northwest Division 1055 in said individual defendants, and said individual defenants desired the continuation of said unlawful practice and its application to all members of defendant Northwest Division 1055 for their own gain in maintaining their own individual purposes in violation of the trust imposed upon them in their official capacities as representatives of the members of said union. . .

"* * * * * *

"XIII

"That subsequent to October 9, 1959, and prior to November 5, 1959, for the purpose of requiring all employees of defendant Greyhound Corporation who were members of Northwest Division 1055 to consent to and execute authorizations for deduction of payment of monthly union dues payable to defendant Northwest Division 1055 so that the Check Off would be applied to all of said employees, and for the purpose of coercing and intimidating all said employees to sign such authorizations for application of the Check Off, and to coerce and intimidate any of such employees from lawfully withdrawing any existing lawful authorization of the Check Off, all of the defendants named in this action, including the individual defendants acting

in their individual capacities, as well as representatives of said unions, conspired, determined and agreed to make an example of the plaintiff and for said illegal and unlawful purposes and in furtherance of said conspiracy *had him taken out of service so he could not work for his employer*, and discriminated against plaintiff as a member of defendant Northwest Division 1055 and have suspended him from said union depriving him of his rights as a member of said union.

"XIV

"That by reason of said wrongful and unlawful acts of the defendants, and each of them, the plaintiff has been prevented from following his employment and earning a living for himself and family and from continuing in the employment for which he has been especially trained and is experienced in, and plaintiff has been deprived of all the benefits from said employment with defendant Greyhound Corporation that have accrued to him by reason of his seniority and experience, and plaintiff has been deprived of all the rights and benefits to which he is and would be entitled to in the future from his membership in defendant Northwest Division 1055, and plaintiff has been harrassed and subjected to mental anguish all to plaintiff's damages in the sum of $100,000.00.

"* * * * *" (Emphasis ours.)

Based upon a finding that plaintiff was discharged from his employment, not because of failure to pay dues, but because the union officers disliked his attitude, the jury returned a verdict for the plaintiff.

The defendants having questioned the jurisdiction

of the state courts, the primary question that must be answered is whether the National Labor Management Relations Act of 1947, as amended, has granted the National Labor Relations Board exclusive jurisdiction of the issues presented under the facts of this case. Whether or not exclusive jurisdiction to determine the issues presented herein lie with the National Labor Relations Board depends upon the congressional intention as expressed in the Act.

The Act provides:

"It shall be unfair labor practice for an employer—

"* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board

shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) *if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership*:

"* * * * *

"(5) * * * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or termi-

nated on some ground *other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;*

"* * * * * " National Labor Relations Act, Unfair Labor Practices, Section 8: 29 USCA 257, Unfair Labor Practices § 158. (Emphasis ours.)

The fact alone that an Act is an unfair labor practice is not the test of the Labor Board's exclusive jurisdiction in all cases. The Act provides, and the Supreme Court of the United States has stated, "the authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." *Smith* v. *Evening News Association*, 371 US 195, 83 S Ct 267, 269, 9 L Ed2d 246.

In *Smith* v. *Evening News Association*, supra, Smith, an employee of the Evening News, sued this employer on behalf of himself and others for damages for breach of a collective bargaining contract entered into between the union and the association. The action was filed in the Circuit Court of Wayne County, Michigan. We quote:

"The trial court sustained respondent's motion to dismiss for want of jurisdiction on the ground that the allegations, if true, would make out an unfair labor practice under the National Labor Relations Act and hence the subject matter was within the exclusive jurisdiction of the National Labor Relations Board. The Michigan Supreme

Court affirmed, 362 Mich. 350, 106 N.W.2d 785, relying upon San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775, and like pre-emption cases. Certiorari was granted, 369 U.S. 827, 82 S. Ct. 843, 7 L. Ed. 2d 793, after the decisions of this Court in Local 174, Teamsters, etc. v. Lucas Flour Co., 369 U.S. 95, 82 S. Ct. 571, 7 L. Ed. 593, and Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 82 S. Ct. 519, 7 L. Ed. 2d 483." 83 S. Ct. 267 at 268, 371 U S 195 at 196.

Section 301 reads as follows:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Labor Management Relations Act, § 301 (a); 29 USCA § 185(a).

It will be noted that the language of the Act does not mention the right of an individual to sue for his injuries, but, as stated by the court in *Smith* v. *Evening News Association, supra*, § 301 "is not to be given a narrow reading." 83 S Ct 267 at 270. Also, as in this matter before us, a member of a union may sue the union of which he is a member in the state courts for causing a breach of the bargaining agreement between the employer and the union. *Humphrey* v. *Moore*, Nos. 17 and 18 US S Ct, January 6, 1964; 32 LW 4055.

A bargaining agreement entered into by the union is for the benefit of both the employees and the employer, and in the matter before us we must assume the union shop clause was considered beneficial to both. It appears from the allegations of plaintiff's complaint that defendants did cause a breach of the bargaining agreement. Therefore, the courts of this state have concurrent jurisdiction with that of the National Labor Board to determine and adjudicate the issues here presented.

If, on the other hand, the suit of the plaintiff is treated entirely on the basis of tortious conduct, separate and apart from § 301 of the Act, I reach the same result.

Without analysis of the basis upon which *San Diego Bldg. Trades Council* v. *Garmon*, 359 US 236, 79 S Ct 773, 3 L Ed2d 775, *Association of Journeymen* v. *Borden*, 373 US 690, 83 S Ct 1423, 10 L Ed2d 638, and *Iron Workers Union* v. *Perko*, 373 US 701, 83 S Ct 1429, 10 L Ed2d 646, as modified by the 1959 amendments to the Act, rest, the majority hold the underlying legal principles set forth in those cases control the issues in the matter before us.

Those cases demonstrate that, where a policy issue is presented, the National Labor Relations Board shall first decide the policy issue, and until decided all courts are denied the primary right of adjudication.

An examination of each of these cases discloses that the word "arguaby" was used by the Court in the primary sense as a word of art, to describe the

existence of an uncertainty as to whether an act or practice, not specifically defined in the Act, engaged in by one of the disputing parties would be protected or not protected within the policy intent of the Act.

"Arguably" as used in the primary sense in Garmon discloses uncertainty existed as to whether or not, under the circumstances existing, peaceful picketing of the premises of defendant Garmon by the union was prohibited or permitted under the Act.

In Borden, the uncertainty existed as to whether the union had a right under the Act to refuse to recommend a member for certain employment who refused to abide by a union rule which might or might not be recognized by the Board as a proper protected concerted activity of the union within the meaning of § 7.

In Perko, the uncertainty existed, first, as to the status of Perko as a foreman or general employee. This question, it was held, is one "of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole." *Marine Engineers Beneficial Assn.* v. *Interlake Steamship Co.*, 370 US 173, 180. And, second, that Perko's discharge by his employer caused by the union was due to Perko's violation of a union rule that may or may not have been a protected rule under the Act.

Certainly, where an agency has been designated to primarily determine whether an act or practice is authorized or protected within the framework of an Act, no court would be in a position to determine whether or not a person was injured by a claimed wrongful

act of another until the law had previously determined that the claimed act, if proven, was wrongful.

That "uncertainty" as to whether an act or practice would be protected or not is the basic reason for the use of the word "arguably" is born out by the language of the Supreme Court of the United States in *Retail Clerks International Association, Local* 1625, v. *Schermerhorn*, — US —, 83 S Ct 1461, 1466, 10 L Ed 2d 678, 684:

> "It is first argued that whether or not a particular union security contract is within the category subjected to state law by § 14(b) is a matter for the Board and no business of the state courts, at least in the doubtful cases where the coverage of § 14(b) is not a clearly settled matter. If a contract is not within § 14(b), the argument goes, it is protected by federal law. If within § 14(b), the arrangement is an unfair practice, at least arguably so. Therefore, *where the status of a contract for the purposes of § 14(b) is at all doubtful, the Board is assertedly the tribunal to deal with the question.* Although we were asked in the petition for certiorari, and again in petitioners' brief for oral argument to resolve the § 14(b) issue in this agency shop case, the clear thrust of th[illegible]hase of petitioners' preemption argument is that neither the Florida courts nor this Court should purport in the first instance to determine the status of an agency shop contract under § 14(b).
>
> "There is much force in the argument that the assessment of any union security arrangement for the purposes of §§ 7, 8 and 14(b), when there is significant doubt about the matter, is initially a

task for the Board, so that it may finally come to this Court with the benefit of the effected agency's views, and in all probability the preemption issue was entitled to different treatment than it received in the Florida courts at the time this case was decided. *But what was then an arguable matter under § 14(b) is not necessarily arguable now. In the first place, as we have held in General Motors Case, an agency shop arrangement is the equivalent of a permitted § 8(a) (3) membership agreement, a result which rules this case since, as we have indicated, § 14(b) subjects to state law the membership agreements, or their equivalent, which are permitted by § 8(a) (3).* Secondly, the Board's brief in the General Motors Case contained the agreement under § 14(b): the provision conditioning employment upon the payment of sums equal to initiation fees and monthly dues is within the §8(a) (3) proviso, within the scope of § 14(b), and hence subject to invalidation by state law. *What was an arguable question of § 8(a) (3) and § 14(b) coverage has been settled, not only in the light of, but consistently with, the views of the Board.* We see no reason to hold our hand at this juncture in order that the Board may arrive again at what is now a foregone conclusion. Cf. Federal Maritime Board v. Isbrandtsen Co. 356 US 481. 2 L ed 2d 926, 78 S Ct 851." (Emphasis ours)

It is also true, there is language in Garmon to the effect that if the act or practice is "arguably" one specifically prohibited by the Act, then the National Labor Relations Board alone has sole power to primarily adjudicate the issue. The basis for the use of the word "arguably" in this sense, later as argued by the Su-

preme Court, lies in the finding of a congressional intent that to effectuate the purposes of the Act, uniformity of remedy is required.

If the gist of plaintiff's action is in damages for tortious dismissal from the union, then, since the 1959 amendment to the Act, the requirement of uniformity of remedy cannot be inferred as the Act provides that any state remedies previously available to a wronged union member by his union remain available.

Section 603(a) of the Labor Management Reporting and Disclosure Act of 1959 provides as follows:

> "* * * except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such Federal law or law of any State."

Prior to the enactment of the Reporting Act the Supreme Court of the United States had held in *Automobile Workers* v. *Russell*, 356 US 634, 78 S Ct 932, 2 L Ed2d 1030, and in *United Workers* v. *Laburnum Corp.*, 347 US 656, 74 S Ct 833, 98 L Ed 1025, that an injured party was not required to forego his common-law remedy in the state courts, even though a remedy was provided the injured party under the National Labor Relations Act.

In *Machinists* v. *Gonzales*, 356 US 617, 78 S Ct 923, 2 L Ed2d 1018, the Court, following the rationale of Russell and Laburnum as to conflict of remedies, held that, where there was only partial relief available through the Board, there was no great danger of conflict with the federal policy by reason of the different

remedies, and the states were, therefore, at liberty in such circumstances to resolve all the issues.

It seems clear to me from the above language of this Act that, insofar as the individual members of a labor organization are concerned, in those instances where they suffer from the tortious acts of a union, Congress intended to set aside the Garmon restrictions and return to the doctrine expressed by the Court in Russell, Laburnum and Gonzales.

To accept the hypothesis of the majority is to argue that Congress intended in those matters affecting the individual workman that uniformity of remedy should require exclusive federal jurisdiction even to the denial of all remedy.

It was to prevent the perpetuation of a remediless no-man's-land in conflicts between organized labor and management under the doctrine of *Guss* v. *Utah Labor Board*, 353 US 1, 77 S Ct 598, 1 L Ed2d 601, that Congress amended the National Labor Relations Act as follows:

> "The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

> "Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction." National Labor Relations Act, 29 USCA § 164(c) (1) and (2).

This 1959 amendment to the Act does not specifically require the application of federal law in those cases where the Board declines jurisdiction, and it is quite clear that Congress in passing this Act rejected the idea that uniformity of remedy was an essential policy requirement as to all phases of the Act.[1]

Certainly Congress, while providing remedial legislation to alleviate the intolerable no-man's-land for labor and management, ought not be accused of intending to create a no-man's-land for the individual workman. Nevertheless, the opinion of the majority creates that very situation and condemns its authors.

The plaintiff filed a complaint with an officer of the National Labor Relations Board, stating he had been discharged by his employer on a false claim by the union that he was delinquent in his dues. The officer of the Board refused to file a complaint with the Board.

Section 10, 3(d) of the Act provides that the General Council of the Board shall have final authority as to "the issuance of complaints before the Board."

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[1] Congress rejected the "Prouty Amendment" (105 Cong. Rec. 5949 [daily ed., April 24, 1959]) which would have required the states to apply Federal law.

It also provides that the General Council shall have authority over the "officers in the regional offices." This section of the Act has been construed to deny the right of the Board to adjudicate a claimed unfair labor practice until the General Council, or someone authorized by him, has issued a complaint. *Hourihan* v. *National Labor Relations Board*, 201 F2d 187, 91 US App 316; *Haleston Drug Stores* v. *National Labor Relations Board*, 187 F2d 418, cert denied, 342 US 815. Thus it would appear that in those instances, as here, where there is a claim that an unfair labor practice has been committed, and the Regional Director refuses to issue a complaint, it is possible that no forum exists for an adjudication that could make the injured workman whole.

If, therefore, the courts are without jurisdiction, the injured workman is denied damages for his injury. In my opinion, the congressional reason for enacting the quoted portion of § 603(a) when amending the Act in 1959, was to prevent this very injustice.

While it may be contended by some that the use of the word "law" should be restricted to acts passed by the state's legislative body, no such restrictive interpretation should be indulged in. The Act is remedial and should be liberally construed to give the workman his prior rights under the recognized law of a state.

For the foregoing reason, I would affirm the judgment of the trial court.

ROSSMAN, J., concurs in this dissent.

DENIAL OF PETITION FOR REHEARING

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 2nd day of MARCH, 1964, WHEREUPON on this TUESDAY, the 28th day of APRIL, 1964, the same being the 24th judicial day of said term, there were present:

Wm. M. McAllister, Chief Justice
George Rossman, Associate Justice
William C. Perry, Associate Justice
Gordon W. Sloan, Associate Justice
Kenneth J. O'Connell, Associate Justice
Alfred T. Goodwin, Associate Justice
Arno H. Denecke, Associate Justice, and
F. M. Sercombe, Clerk,

when the following proceedings were had:

ELMER J. DAY, *Respondent*	)	
v.	)	
NORTHWEST DIVISION 1055 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a labor union, and C. A. BANKHEAD, an individual, *Appellants*	)	Appeal from MULTNOMAH County

The court having duly considered respondent's petition for rehearing, and the court being fully advised therein,

IT IS HEREBY ORDERED that said petition be and the same hereby is DENIED.

JUDGMENT OF OREGON SUPREME COURT

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 7th day of OCTOBER, 1963, WHEREUPON on this WEDNESDAY, the 29th day of JANUARY, 1964, the same being the 41st judicial day of said term, there were present:

Wm. M. McAllister, Chief Justice
George Rossman, Associate Justice
William C. Perry, Associate Justice
Gordon W. Sloan, Associate Justice
Kenneth J. O'Connell, Associate Justice
Alfred T. Goodwin, Associate Justice
Arno H. Denecke, Associate Justice, and
F. M. Sercombe, Clerk,

when the following proceedings were had:

ELMER J. DAY, *Respondent*	)	
v.	)	
NORTHWEST DIVISION 1055 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a labor union, and C. A. BANKHEAD, an individual, *Appellants*	)	Appeal from MULTNOMAH County No. 261 121

This cause on July 1, 1963, having been duly argued and submitted upon and concerning all questions aris-

ing upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and ADJUDGED that the judgment of the court below rendered and entered in this cause be and the same hereby is in all things reversed and set aside.

IT IS FURTHER ORDERED that appellants have and recover of and from respondent their costs and disbursements in this court taxed at $1230.90.

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter judgment in conformity with the opinion of the court herein and in accordance therewith.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 301

ELMF J. DAY, *Petitioner,*

v.

NORTHWEST DIVISION 1055 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a labor union, and C. A. BANKHEAD, an individual,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 301

ELMER J. DAY, *Petitioner*,

v.

NORTHWEST DIVISION 1055 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a labor union, and C. A. BANKHEAD, an individual,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

A. The only question presented in this case and decided by the Court below is:

Can a State court, in an action under State law for tortious interference with employment, assert juris-

diction over union conduct so regulated by the Congress as to be certainly either an unfair labor practice or protected concerted activity—causing an employee's discharge, under a union security clause in a collective bargaining agreement, by advising the employer that the employee had become delinquent in his union dues payments?

B. The Question Presented stated in the Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon herein ("Pet." hereinafter) is not involved in this case, and was not presented to or decided by the Court below. While petitioner's Question is predicated on an action "against a labor union for wrongfully expelling him from the union," Pet. 2, the truth is, as the Court below held, that this is and was throughout an "action for tortious interference with his employment * * *." 78 Ore. Adv. at 122, 389 P.2d at 43, Pet. 22.[1] This case involves no issue of breach of contract or fiduciary obligation or Landrum-Griffin —the pleadings, the trial record and the majority decision below will be searched in vain for any such issues. See also pp. 12-17, *infra*. Accordingly, ex-

[1] Petitioner's reiterated references to "expulsion", Pet. 2, 7, 8, 10, 12, 15, reflect no more than his own rhetoric. As this case involves a "discharge" from employment, Pet. 3, 4, 9; 5, 7, 13, rather than and more than the "expulsion" from membership, petitioner misunderstands and repeatedly misstates the case. To take but one example; petitioner states that the Court below acted "on the mistaken premise that such *expulsion* was 'arguably' an unfair labor practice subject to the exclusive regulation of the National Labor Relations Board." Pet. 7 (emphasis added). The truth is that the Court below well understood that the case concerned interference with employment consequent upon expulsion from the Union, precisely the union conduct which is undeniably subject to the jurisdiction of the Board. See pp. 10-12, *infra*.

traordinary as it may be, this petition asks review by this Court of issues not presented in the case.[2]

STATUTE INVOLVED

The only pertinent statutory provisions are Sections 7, 8(a)(3), 8(b)(1), and 8(b)(2) of the National Labor Relations Act as amended, 49 Stat. 449, 61 Stat. 136, 73 Stat. 525 ("the Act" hereinafter), 29 U.S.C. §§ 157, 158(a)(1), 158(a)(3), 158(b)(1), and 158(b)(2), which are set forth in Appendix A of the Petition. Pet. 17-19.

STATEMENT

Prior to November 1, 1959, the petitioner, Elmer J. Day, was employed as a bus driver by the Greyhound Corporation ("Greyhound" hereinafter) and had been by timely dues payments maintaining his membership in good standing in respondent labor union, Northwest Division 1055 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America ("Union" hereinafter). Petitioner neglected to pay his October Union dues by November 1, however, as required by the International Constitution of the Union; and he thus both surrendered his membership in good standing in the Union and rendered himself liable to discharge from his employment.

The governing provision of the Constitution provided, "Where agreements with employing companies provide that members must be in continuous good

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[2] Lurking in the petition may be questions which, "abstractly considered, * * * may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

financial standing, the member in arrears one month may be suspended from membership and removed from employment, in compliance with the terms of the agreement." Trial Exhibit ("Tr. Ex." hereinafter) 59. These are the "relevant provisions of the Union's Constitutional and General Laws" upon which respondents rely, not those referred to in the petition and the dissent below. See Pet. 11; 78 Ore. Adv. at 128, 389 P.2d at 46, Pet. 30. The Union had an agreement with Greyhound requiring the maintenance of Union membership as a condition of employment.[3]

Petitioner having surrendered his membership by failing to pay his October dues, the other respondent, C. A. Bankhead, the Financial Secretary of the Union, advised Greyhound that petitioner no longer satisfied the condition of employment relating to maintaining Union membership and was thus to be terminated in accordance with the collective bargaining agreement. On or about November 3, 1959, Greyhound discharged petitioner.

On November 12, 1959, petitioner filed a charge of unfair labor practice against the Union, alleging violation of §§ 8(b)(1) and (2) of the Act, with the ap-

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[3] There is no dispute that the collective bargaining agreement in effect in November, 1959, required that all employees must remain members of the Union as a condition precedent to continued employment. The Court majority below did not quote from the collective bargaining agreement. See Pet. 11, n. 4. Its reading of the agreement was that "this contract required Day to remain a member of the union in good standing in order to retain his employment." 78 Ore. Adv. at 121, 389 P.2d at 43, Pet. 22.

Under the International Constitution Day was thus obligated to have paid his October dues by November 1; petitioner's assertion to the contrary, Pet. 12, disregards both the collective bargaining agreement and the reference in the International Constitution to that agreement.

propriate Regional Office of the National Labor Relations Board ("the Board" hereinafter). The specific charge was: "The above labor organization successfully and unlawfully demanded my discharge by the employer named below for the reason of delinquency in dues."[4]

On December 15, 1959, petitioner was advised by the Regional Director of the Board that his charge had been investigated, and that there was insufficient evidence of any violation under the Act.[5] Although petitioner was also advised that he had a right of appeal to the General Counsel of the Board, he never appealed. Accordingly, the Board determination of no violation became final.

On November 30, 1959, petitioner filed his original complaint, and in 1960 and 1961 amended complaints, in the Circuit Court for the State of Oregon for the County of Multnomah, against the present respondents and others—originally including, but thereafter eliminating Greyhound—alleging a conspiracy unlawfully to demand petitioner's discharge from Greyhound for the reason of delinquency in dues. The only relief demanded was damages, both special and punitive; petitioner did not seek reinstatement to Union membership. All the damages alleged flowed from the loss of his *employment* with Greyhound and the loss of *employment* opportunities in the field of bus driving.[6]

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[4] Tr. Ex. 55, 78 Ore. Adv. at 126, 389 P.2d at 45, Pet. 27 (dissenting opinion).

[5] Tr. Ex. 54, 78 Ore. Adv. at 126-127, 389 P.2d at 45-46, Pet. 28-29 (dissenting opinion).

[6] The recital of damages at Pet. 9 confirms that all damages claimed flowed from the loss of employment and employment opportunities "in his chosen vocation."

None of the complaints alleged any violation of the collective bargaining agreement. None purported to be based upon Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 ("Section 301" hereinafter). None purported to be based upon any provision of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531, or, indeed, on any provision of Federal law. The suit was based and tried solely upon the basis of State law.

Respondents duly raised and preserved the defenses that the subject matter of the action had been preempted by the Congress in the Act; that petitioner had not exhausted his internal remedies under the Union laws; and also that he had not availed himself of the collective bargaining contractual remedies of grievance procedure and arbitration.

On February 9, 1962, the jury, upon the trial, returned a verdict against respondents in the amount of $50,000.00 in general damages and $20,000.00 in punitive damages. In response to a special interrogatory submitted by the Court, the jury found that there was a conspiracy by respondents as charged.

On the appeal, while respondents preserved all their contentions establishing that the verdict should be reversed, the Supreme Court of Oregon considered only the issue of preemption, and decided, with two dissenting votes, that the State had no jurisdiction. The Court relied squarely upon *Plumbers' Union* v. *Borden*, 373 U.S. 690 (1963) ("*Borden*" hereinafter) and *Iron Workers* v. *Perko*, 373 U.S. 701 (1963) ("*Perko*" hereinafter) as definitively holding that a State court can assert no jurisdiction over union conduct "arguably" or "reasonably" subject under the

Act to the jurisdiction of the Board. And the Court held that the Act provides that:

> "* * * a union may lawfully require an employer to discharge an employee for a failure to maintain good standing in the union, when the union contract permits it, as in the instant case. * * * But, if the discharge for failure to pay dues was used as a subterfuge to hide some other improper motive, as in the instant case, the union, at least, has been guilty of an unfair labor practice and the National Labor Relations Board will, presumably, protect the workman's rights. *The cases leave no doubt that the decision as to the true nature of the discharge is within the cognizance of the Board.*" 78 Ore. Adv. at 123, 124, 389 P.2d at 44, Pet. 24-25 (emphasis added).

ARGUMENT

There is no reason for granting this petition. Petitioner does not claim that his case raises issues of general importance. Furthermore, the decision below is so plainly in accord with principles of law enunciated by this Court as to warrant no further consideration by this Court.

I

This Case Has No General Importance

Petitioner fails to show any general importance in this case. Indeed, petitioner tenders no more than the bare assertion that "This case affords this Court the occasion to clarify current misunderstandings" with respect to labor law. Pet. 6-7. Petitioner makes no attempt to specify precisely what the misunderstandings are; nor does he explain how the alleged misunderstandings have been displayed—except that he be-

lieves the decision below to be in error. In fact, this petition in its entirety is no more than a re-argument (after the denial of a petition for rehearing below; Pet. 46) that the decision of the Court below was in error.

Stretching the assertions in the petition to their furthermost point, there is presented here only a case where a State court, applying decisions of this Court to a particular record, has determined that State jurisdiction is precluded because the matter is clearly within the cognizance of the Board. Review of the decision below on its merits would turn on the wording and effect of this particular complaint, and the facts of this particular record including the wording and practice under this particular collective bargaining agreement (which has since expired) and these particular Union laws (which have since been amended). None of this presents the faintest glimmer of a question of general importance which would justify the attention of this Court.[7]

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[7] The lack of any claimed conflict of decision emphasizes the lack of general importance in this case. It may be appropriate to note that another Greyhound bus driver was discharged at this time at the instance of the Union for the identical reason. He also filed suit under State law, as a resident of Idaho, in the District Court of the Third Judicial District of Idaho. There the trial court upheld a motion to dismiss on the ground of preemption; but the Supreme Court of Idaho reversed, saying it found the Federal law as it then stood unclear. *Lockridge* v. *Amalgamated Association*, 84 Idaho 201, 369 P.2d 1006 (1962). This was decided prior to the decisions of this Court in *Borden* and *Perko*. It may well be that petitioner made no mention of *Lockridge* precisely because *Borden* and *Perko* so clearly resolve any issue mustered by the Supreme Court of Idaho in *Lockridge*. The *Lockridge* case has not yet been called for trial. There is no reason to anticipate that on any appeal the decision of the Supreme Court of Idaho would fall out of step with *Borden*, *Perko* and the decision below.

II

The Decision Below Is Obviously Correct

The entire thrust of the petition is that this case was wrongly decided below and that the judgment below should now be reversed for the benefit of petitioner. The short answer is that even if this particular decision were in error, "this Court does not sit * * * for the benefit of particular litigants." *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955). Whenever "review would be of no importance save to the litigants themselves" the writ of certiorari should not be granted. *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962).

Moreover, far from being wrong, the decision below is obviously correct. It is firmly based upon principles clearly and repeatedly enunciated by this Court. This Court has recognized different types of cases raising preemption issues, and there can be no doubt that the Court below accurately analyzed and categorized this case in accordance with the rulings and standards of this Court.

1. The legal principle which the Court below held decisive, relying primarily upon *Borden* and *Perko*, is that a State court lacks jurisdiction over union conduct which is arguably subject to the jurisdiction of the Board—arguably either an unfair labor practice or protected concerted activity under the Act. This principle is surely established beyond any possible confusion or misstatement.[8]

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[8] As the Court below pointed out, the rule of *Borden* and *Perko* has been expressly reaffirmed by this Court in *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 105 (1963), this Court stating: "We held in *Plumbers' Union* v. *Borden*, 373 U.S. 690, and in *Iron Workers* v. *Perko*, 373 U.S. 701, that *Garmon* pre-empted the field

Petitioner does not challenge this principle so much as question its application. His entire position rests upon the contention that the Union conduct at bar cannot be considered an unfair labor practice or within the jurisdiction of the Board. That contention is completely refuted by scores of pertinent decisions, none of which petitioner mentions, and by the provisions of the Act which they interpret and apply.

The Union conduct for which petitioner sought damages was that the Union caused his discharge under the collective bargaining agreement by advising his employer that he had become delinquent in his Union dues payments; and petitioner asserted that he was not delinquent in fact and that others in identical status were not discharged at Union request. If petitioner is correct, this would constitute a discriminatory discharge.

Charges of discriminatory discharge are filed with the Board every day, just such a charge as petitioner filed against respondents. Over and over and over again, the National Labor Relations Board, and the Federal courts in reviewing the decisions of the Board, have considered and decided under the Act the precise issue which the trial Court in Oregon has presumed to decide here—the basis in fact of a discharge induced by a union's assertion, under a valid union security clause, that an employee had lost his good standing

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where employees were suing unions for damages arising out of practices that arguably were unfair labor practices subject to regulation by the National Labor Relations Board • • •." 78 Ore. Adv. at 124, 389 P.2d at 44, Pet. 25-26. Even more recently, this Court has held that "Congress has invested the National Labor Relations Board with the exclusive power to adjudicate conduct arguably protected or prohibited by the National Labor Relations Act." *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 (1964); *Hattiesburg Unions* v. *Broome Co.*, 377 U.S. 126 (1964).

with the union because of delinquency in dues payments.[9] These cases do not lose their force and vitality merely because petitioner has elected not to mention them. These cases provide ineradicable proof that this union conduct is within the jurisdiction of the Board.

The plain fact is that Section 8(b)(2) of the Act makes all discriminatory discharges caused by a labor union unfair labor practices—with the single exception of any discharge in good faith compliance with the requirements for union membership and dues payments pursuant to a union security clause in a collective bargaining agreement.

Whenever the discharge is in fact for the asserted ground of union dues delinquency, the union activity is protected under the Act; whenever that asserted ground is invalid legally or is not the true reason factually for the union's requesting the discharge, the union's conduct is discriminatory under the Act and is prohibited as an unfair labor practice. The provisions of the Act, and the administrative and judicial decisions under the Act, permit no doubt whatever that

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[9] *Radio Officers* v. *Labor Board*, 347 U.S. 17 (1954) is the leading case. The Court below cited *N.L.R.B.* v. *Technicolor Motion Pic. Corp.*, 9th Cir. 1957, 248 F.2d 348, and *International Union of Electrical, R. & M. Wkrs.* v. *N.L.R.B.*, D.C. Cir. 1962, 307 F.2d 679, 78 Ore. Adv. at 123, 389 P.2d at 44, Pet. 24. For a complete catalog of the cases, see, e.g., American Digest System, Labor Relations, Key Numbers 368, 395 (West Publishing Co.); Cumulative Digest and Index, LRRM, §§ 59.230-59.231 (Bureau of National Affairs); Labor Law Reporter Par. 4525 (Commerce Clearing House).

All these cases involve collective bargaining agreements, the expulsion of a member from his union, direct labor management relations, and the encouragement of dues payments requisite to union membership. *Cf.* Pet. 12-13. These cases reduce petitioner's assertions that the Board lacks jurisdiction to the vacuum of *ipse dixit*.

this case involves union conduct "arguably" and "reasonably" subject to Board jurisdiction.

The Court below was plainly correct in deciding that there could be no assertion of State jurisdiction. The judgment below cannot be in error if *Borden* and *Perko* are binding law. This case is blanketed by *Borden* and *Perko*.

2. Even if the union conduct might be judged as neither arguably protected nor arguably prohibited "it is still necessary to determine whether * * * 'Congress occupied this field and closed it to state regulation.' *Automobile Workers* v. *O'Brien*, 339 U.S. 454, 457." *Teamsters* v. *Morton*, 377 U.S. 252, 258 (1964); *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 6 (1957). *A fortiori*, this rule applies if Congress has so occupied the particular field of union conduct that it must necessarily be either an unfair labor practice or lawful concerted activity. The union conduct here has been thus regulated by the Congress, as we have seen; and the Supremacy Clause accordingly bars any assertion of State jurisdiction.

3. An action based upon Section 301 for violation of a collective bargaining contract has concurrent Federal and State jurisdiction. *Humphrey* v. *Moore*, 375 U.S. 335 (1964)[10]; *Smith* v. *Evening News Association*,

[10] In *Humphrey* v. *Moore*, the procedures provided in the collective bargaining agreement had been invoked and exhausted: The plaintiff's claim was that the contractual "Joint Committee exceeded its power [under the collective bargaining agreement] in making the decision it did," and for this reason, "the settlement is said to be a nullity and his impending discharge a breach of contract." 375 U.S. at 342. Further, plaintiff made allegations which charged "a breach of duty by the union in the process of settling the grievances at issue under the collective bargaining agreement." *Id.* at 343. Such a case has no relationship to this

371 U.S. 195 (1962).[11] In deciding that this was not such an action, the Court below was clearly correct.

The plain truth—undenied and undiscussed in the petition—is that this case was pleaded and tried exclusively on a tort theory.[12] Further, there appears to be no conceivable collective bargaining contract violation petitioner could have alleged as a basis for suit: The employer, who was not a defendant and not charged with being a participant in the alleged tortious conspiracy, did no more, upon being notified by the Union that petitioner was delinquent in his dues, than

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case where petitioner made no effort to avail himself of the contractual grievance and arbitration procedure, or to request the Union to invoke the contractual procedures. Here, too, petitioner raises no question—and none can be raised—about the contractual power of the Union to request a discharge when it took the position an employee had become delinquent in his dues payments, or the contractual power of Greyhound to discharge him upon such advice from the Union.

[11] *Smith* v. *Evening News Association* was a suit which expressly in form and clearly in substance alleged a violation by the employer of a contract provision precluding discrimination against union members, in that the employer paid nonunion employees but did not pay union employees, during a strike. How this context can be analogized to that at bar is unexplained in the petition.

In any event, this Court was careful to note, "There was no grievance arbitration procedure in this contract which had to be exhausted before recourse could be had to the courts. Compare *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238; *Drake Bakeries, Inc.* v. *Local 50, American Bakery Workers*, 370 U.S. 254." 371 U.S. at 196, n. 1. In the instant case, there was such a procedure. Petitioner did not even attempt to utilize it. He is thus precluded from any court action on the collective bargaining contract.

[12] Petitioner has not established that in Oregon punitive damages may be awarded in contract actions. *Cf. Smith* v. *Abel*, 211 Ore. 571, 595, 316 P.2d 793, 804 (1957); *Weaver* v. *Austin*, 184 Ore. 586, 200 P.2d 593 (1949).

act—in petitioner's own words—"on the basis that it was complying with its specific contractual obligation with the Union to terminate the employment of persons who were no longer union members." Pet. 13. In addition, the contract contains a grievance and arbitration procedure which petitioner admittedly did not attempt to invoke. As petitioner neither requested the union to file a grievance on his behalf nor himself presented any grievance to his employer,[13] he has not satisfied an apparent condition precedent to litigation,[14] and there is no foundation for his assertions that this may be considered an action for violation of the collective bargaining agreement or involving the duty of the Union to represent him fairly.

In any event, petitioner's position would not be at all advanced even if this were considered to be a Section 301 action. His position requires that the governing law be State law. But it is unmistakably clear that Federal law governs in Section 301 actions, whether tried in State or Federal courts. *Teamsters* v. *Morton, supra; Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238

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[13] Section 9(a) of the Act contains a proviso "That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment." 29 U.S.C. § 159(a).

[14] See footnote 11, *supra*. Moreover, under the State law of Oregon—the law upon which petitioner is relying—the exhaustion of internal union and collective bargaining contract remedies must be pleaded and proved. *Fox* v. *Knight*, 221 Ore. 1, 350 P.2d 177 (1960); *Way* v. *Patton*, 195 Ore. 36, 241 P.2d 895 (1952); *Jacobsen v. Luckenbach Steamship Co.*, D. Ore., 201 F. Supp. 883, 889 (1961).

(1962)[15]; *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). And the applicable Federal law, as indicated above, permits as lawful concerted activity discharges under a union security clause for allegedly delinquent union dues, unless the Board shall find them to be unfair labor practices under the Act. The Federal law dispositive of this case is the judgment of the Board that petitioner had not proved any violation of law; the necessary corollary is that the Board found the union conduct to be protected, lawful concerted activity under the Act. As even the dissenting opinion below found, "all of the evidence offered in this case was available at the time the complaint was filed" with the Board. 78 Ore. Adv. at 126, 389 P.2d at 46, Pet. 28-29. This Board determination is the Federal law of the case; and the Court below was quite correct in honoring it. Even if this could be considered a Section 301 case, therefore, the judgment below is correct.

4. State jurisdiction may be exercised if an action (as in *Machinists* v. *Gonzales*, 356 U.S. 617 (1958)) "was focused on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment and * * * the principal relief sought was restoration of the union membership rights." *Borden*, 373 U.S. at 697. In this case, however, the action was focused on the employment relationship—the sole relief sought was damages measured exclusively by and flowing directly from the loss of employment and employment

[15] *Atkinson* v. *Sinclair Refining Co.* also holds that individual officers and members cannot be held liable in damages for union contract breaches. 370 U.S. at 247-249. This additional principle of Federal law precludes any recovery on petitioner's theory against respondent Bankhead.

opportunities. Petitioner made no request whatever for reinstatement to Union membership. Accordingly, the Court below was clearly correct in judging that the case could not possibly be considered as falling in this category.[16]

In apparent recognition of the deficiencies of his contention that State jurisdiction should not be preempted here under the National Labor Relations Act, petitioner seeks haven in the Labor-Management Reporting and Disclosure Act of 1959. But his resort to this statute fails on both procedural and substantive grounds. Procedurally, no such issues can be raised in this Court as none were decided by the Court below, nor presented to it prior to the petition for rehearing, which was denied without discussion. Substantively, the provisions cited by petitioner, Pet. 15, are clearly inapplicable. Section 101(a)(5), which establishes certain procedural safeguards against improper disciplinary action by a union against a member, expressly excludes suspensions and expulsions "for nonpayment of dues"; and nonpayment of dues was the one and the only basis on which petitioner rendered himself liable to expulsion and was in fact expelled from membership in the Union.[17] And Section 603(a), which pre-

[16] Indicative of the extremity of petitioner's argument is the glaring inconsistency in his asserting that his particular case should be held within both this category, from which "matters of employment" must be excluded, and also the category of Section 301 cases, which necessarily include and involve "matters of employment" as covered in collective bargaining contracts.

[17] If petitioner would now obtain the procedural relief within the Union embraced by the statute, the substantive issue would still be whether in objective fact—regardless of the subjective motivations of respondent Bankhead—his dues were paid up to date under the Union Constitution. See pp. 3-4, *supra*. If respondent Bankhead betrayed his union trust, there were internal Union remedies which were available to petitioner, but he failed to invoke them.

serves remedies otherwise available, is irrelevant here because there was no State remedy otherwise available in the light of the Congressional preemption of this field of union conduct.

There is no legal basis upon which the Court below could have asserted jurisdiction. Congress has regulated the union conduct complained of here expressly and comprehensively. This Union conduct is not merely arguably, but is necessarily, either an unfair labor practice or protected concerted activity under the Act. Congress has precluded State jurisdiction and established jurisdiction over this particular union conduct in the Board. Indeed, petitioner himself recognized this when he first presented his claim to the Board, which disposed of it finally. The Supreme Court of the State of Oregon had no Constitutional alternative to foreclosing the State courts from asserting jurisdiction over this Union conduct.

CONCLUSION

Since the Court below has disposed of this litigation in accordance with the decisions of this Court, there is no warrant for further review of the case by this Court. This case presents neither issues of general importance nor conflict with the decisions of this Court or any other court. This case is confined to its own particular facts.

For the reasons stated herein, respondents respectfully pray that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 301

ELMER J. DAY, *Petitioner*,

v.

NORTHWEST DIVISION 1055 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

REPLY BRIEF

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REPLY BRIEF

Respondents' brief in opposition patently fails to meet the main issues tendered by our petition for certiorari. It may be helpful to the Court to point out some of the respects in which that brief misconceives or sidesteps the relevant issues.

1.

Respondents' first and most extended argument in support of the decision below (see pp. 9 to 12 of their brief) rests on the false premise that petitioner's "entire position rests upon the contention that the Union conduct at bar cannot be considered an unfair labor practice or within the jurisdiction of the Board." In fact, the petition for certiorari clearly states, with respect to the Union conduct involved, that "it is not necessary to decide whether it is 'arguably' an unfair labor practice" (see p. 13), and places primary reliance on the proposition that, where the policy of Section 301(a) of the Labor Management Relations Act is violated:—

> "federal and state courts have jurisdiction, even where the conduct 'not only arguably but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board.' *Smith* v. *Evening News Association*, 371 U.S. 195; *Humphrey* v. *Moore*, 375 U.S. 335; *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261." (see p. 10)

Respondents, in addressing themselves to the Section 301 issue (pp. 12-15 of their brief), profess not to see the relevance of *Humphrey* v. *Moore* and *Smith* v. *Evening News Association*, and argue that this case was pleaded and tried exclusively on a tort theory and that there was no conceivable collective bargaining agreement violation.

These contentions are incompatible with this Court's adjuration that Section 301 "is not to be given a narrow reading," *Smith* v. *Evening News Association*, 371 U.S. 195 at 199, on which basis the Court interpreted the section as permitting suits by employees to vindicate their individual rights. Nor do they square with the notion that "substance and not form must govern," see Justice Goldberg's concurring opinion in *Humphrey* v. *Moore*, 375 U.S. 335 at 352, for which reason it was considered immaterial

that the complaint before the state court made no reference to Section 301 as the source of the action.

These contentions are further effectively answered by the dissenting opinion below. Here, after pointing out that *Smith* v. *Evening News Association* gave an individual union member the right to sue for his injuries, and that *Humphrey* v. *Moore* conferred on him the right to sue his union for breach of the bargaining agreement between the employer and the union, the dissenters said:—

> "A bargaining agreement entered into by the union is for the benefit of both the employees and the employer, and in the matter before us we must assume the union shop clause was considered beneficial to both. It appears from the allegations of plaintiff's complaint that defendants did cause a breach of the bargaining agreement. Therefore, the courts of this state have concurrent jurisdiction with that of the National Labor Board to determine and adjudicate the issues here presented" (see Petition, App. B, p. 38).

Respondents further argue that petitioner should have availed himself of a grievance arbitration procedure (see pp. 13 and 14 of their brief) and should have exhausted internal union procedures (see p. 16). These issues were not passed on by the Oregon Supreme Court, which decided this case solely on the basis of pre-emptive jurisdiction. Such procedures are clearly inapplicable here, where a person expelled from union membership is exercising his right to sue for damages. The grievance arbitration procedure discussed on page 14 of respondents' brief (which was unsuccessfully pleaded to the Trial Court) and the statutory proviso quoted in footnote 13, apply only to suits against employers and not to suits against unions. Exhaustion of union appellate procedures (an argument likewise rejected in the Trial Court) is a relevant consideration where an employee seeks reinstatement, not where, as here, he has been made a stranger to the Union and is pursuing his remedy in damages. Most significantly, an appeal to the Union which would have been a futile gesture cannot be regarded as pre-requisite to the mainteance of a suit.

Respondents' proposition that this case involves lawful concerted activity (pp. 14-15), even if assumed to be relevant to a Section 301 action, is erroneous for reasons that will be set forth on pages 5 and 6, below.

2.

Even were one to assume that petitioner's cause of action was predicated entirely on tortious conduct and did not involve a violation of a collective bargaining agreement, the state courts would, neverthless, have jurisdiction over this proceeding. A basic support for this proposition advanced in our petition was Section 603(a) of the Labor Management Reporting and Disclosure Act of 1959.

Since Section 603(a) is merely declaratory of a Congressional intention to preserve state law remedies otherwise available to injured employees, it is difficult to understand the so-called "procedural ground", raised by respondents on page 16 of their brief. Respondents' only argument directed specifically to Section 603(a) is to the effect that, because of Congressional pre-emption of the field, no state remedy is available. In addition to being an obvious begging of the question, this argument has already been refuted in the first section of this brief, and will be further shown to be erroneous in the following section. At no point does respondents' brief come to grips with the issue posed in our petition (see p. 9) and in the dissenting opinion—that the Congressional purpose in enacting Section 603(a) was to prevent the injustice of denying damages to an injured workman for his injuries and to avoid creating a "no-man's-land for the individual workman" (see Petition, App. B, pp. 44, 45).

3.

As indicated at the outset of this brief, the propriety of the State Court's assumption of jurisdiction in this case does not depend on whether the controversy in question is

within the jurisdiction of the Board; the basic issue is whether it is within the pre-emptive jurisdiction of the Board to the exclusion of alternative remedies.

In evading this issue, respondents rely on a bobtailed statement of the relevant facts. Their brief ignores the Union's involvement in the illegal "check-off" of petitioner's wages, the fact that petitioner's suspension from membership was part of the Union's general campaign of intimidation and that it was attributable to the ill-will borne petitioner for his conduct in protesting this illegal activity and reflected a desire to make an example of him. The Union's activities were in furtherance of a purpose prohibited by a penal statute, Section 302(a) of the Taft-Hartely Act. Accordingly, independently of the other grounds urged in our petition, the Union's activity cannot be regarded as "federally protected activity" and, consequently, is not subject to the pre-emptive jurisdiction of the National Labor Relations Board. See Justice Harlan's concurring opinion in *San Diego Building Trades Council* v. *Garman*, 359 U.S. 236 at 250 *et seq.*

In their effort to counter petitioner's view that this dispute is an internal one between the Union and its members, respondents blur the elementary and long-established distinction between the substantive acts underlying a cause of action, and the damages consequent upon those acts. This cause of action is based solely on the acts of the Union and its officers in depriving petitioner of union membership and, as in *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, involves an essentially internal union dispute. Moreover, the loss of monetary and other rights caused petitioner by the Union's illegal acts (which are set forth on page 9 of the petition) are damages flowing directly from the termination of his Union membership.

To the extent that this dispute "was focused on purely internal union matters, i.e., on relations between the indi-

vidual plaintiff and the union not having to do directly with matters of employment," *Association of Journeymen* v. *Borden*, 373 U.S. 690 at 697, State jurisdiction may validly be exercised. This was the case in *Gonzales*, which like the present case, concerned union membership rights, whereas, *Borden*, *Perko* and *Garmon*, the cases relied on by respondent and the court below, did not focus on purely internal union matters. *Borden* and *Perko* involved the efforts of a union to enforce a union working rule, and *Garmon* concerned a union's engaging in peaceful recognition picketing. It should be noted further that both of these activities involve conduct that is clearly either protected by Section 7 or prohibited by Section 8 of the National Labor Relations Act. Moreover, in none of these three cases had the employee, as here, applied to the National Labor Relations Board and been turned down. Here, where the Board has declined jurisdiction, it can no longer be urged that the case is "arguably" before the Board.

4.

Respondents' brief concedes (see p. 8, fn. 7) that the decision of the Oregon Supreme Court below is at variance with that of the Supreme Court of Idaho in *Lockridge* v. *Amalgamated Association*, 84 Idaho 201, 369 P. 2d 1006. It also conflicts with the decision of the Pennsylvania Supreme Court in *Local 2* v. *Masters, Mates & Pilots*, 414 Pa. 277, petition for certiorari filed, Docket No. 299, July 18, 1964. The decision below is inconsistent with the legislative history and policy of the Taft-Hartley Act, as set forth by the Fourth Circuit in *Parks* v. *International Brotherhood of Electrical Workers*, 314 F. 2d 886, cert. denied, 372 U.S. 976, and of the Landrum-Griffin Act, as set forth by the Third Circuit in *Rekant* v. *Shoctay-Gasos Union, Local 446*, 320 F. 2d 271. Finally, as stressed in this brief, the decision below conflicts with the legal principles set forth in *Humphrey* v. *Moore* and *Smith* v. *Evening News Association*.

From the above, it would seem clear that this case involves issues of substantial importance in the administration of Federal labor legislation and in the safeguarding of private rights from arbitrary group action.

Respectfully submitted,

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